



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2022-0103; FRL-9624-02-R8]

Air Plan Approval; Colorado; Reg 3 NSR and APEN Updates

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing approval of regulatory amendments submitted by the State of Colorado on May 13, 2020. The revisions make limited amendments to the State's New Source Review (NSR) and Air Pollution Emission Notices (APEN). The EPA is taking this action pursuant to the Clean Air Act (CAA).

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2022-0103. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <http://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Kevin Leone, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD-IO, 1595 Wynkoop Street, Denver, Colorado, 80202-1129, telephone number (303) 312-6227, email address leone.kevin@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

I. Background

The background for this action is discussed in detail in our March 23, 2022 proposed rulemaking (87 FR 16439). In that document we proposed to approve revisions to Colorado's minor source NSR permitting program. Specifically, EPA proposed to approve revisions to Regulation Number 3 (Stationary Source Permitting and Air Pollution Emission Notice Requirements), including Part A (General Provisions Applicable to Reporting and Permitting), Part B (Construction Permits), and Part C (Operating Permits).

We invited comment on all aspects of our proposal and provided a 30-day comment period. The comment period ended on April 22, 2022. We received comments on our proposed rulemaking. The comments and our responses are listed below.

II. Response to Comments

On April 22, 2022, the EPA received comments from The Center for Biological Diversity, Henceforth referred to as "commenter."

Comment: Commenter asserts, "EPA must disapprove the Colorado permitting program because it excludes emissions prior to operations such as drilling, fracking, and completion which may cause or contribute to violations of the NAAQS." In support of this assertion, commenter offers three arguments. First, Commenter states that EPA has not supported its approval of the State's revised definition of "Commencement of Operation" with modeling data to demonstrate that the revised definition will not cause or contribute to NAAQS violations. Commenter states that such modeling is required by EPA regulations to be included in State Implementation Plan (SIP) submittals. Second, Commenter states that available evidence indicates that "pre-production" emissions from oil and gas facilities endanger the National Ambient Air Quality Standards (NAAQS). Commenter cites broadly to Colorado Air Mobile Monitoring Lab (CAMML) data, asserting that it shows that "activities which EPA proposes to approve into the SIP can endanger the NAAQS in violation of EPA's regulations for minor source permitting programs." Commenter also states that, "Preproduction emissions from oil and

gas well pads are significant emitters of VOCs which contributes to ozone.” Finally, Commenter states that the revised definition of Commencement of Operation “excludes oil and gas pollution emitting activities such as drilling wells, ‘fracking’ wells, and completing wells.” Commenter argues, “40 C.F.R. § 51.160(e) requires states to justify the exclusion of any types of sources from review which is what the definition of commencement of operations does. But no justification has been provided here.”

Response: This SIP revision is approving limited rule revisions by Colorado that update the State’s permitting regulations to reflect consistency within the permitting program and with Colorado Statutes. This comment raises issues that extend beyond those presented by the two changes to Part A, Section I.B of Regulation 3, that EPA is approving. This includes the addition of clarifying language to the definition of “Commencement of Operation” at Section I.B.12 and a new definition of the term “Well Production Facility” at Section I.B.47. Prior to these changes, “Commencement of Operation” at any facility was defined to occur when the facility “first conduct[ed] the activity that it was designed and permitted for.” This part of the definition has not been revised and remains applicable to all facilities. With the two additions, however, “Commencement of Operation” at an oil and gas well production facility has been clarified and is now defined to occur on “the date any permanent production equipment is in use and product is consistently flowing to sales lines, gathering lines or storage tanks from the first producing well at the stationary source, but no later than end of well completion operations (including flowback).” These additions, while limited in scope, provide improved clarity for operators of oil and gas well production facilities and for the State as to the timelines for certain actions required in the minor NSR permit application process in Part B of Regulation 3. This includes establishing a clear date for assessing compliance and impacts under Section III.B and a firm deadline for submitting notices and demonstrations under Section III.G. These regulatory changes are essentially procedural in nature and do not alter Colorado’s approach to issuing

construction permits for emissions from facilities that have completed construction and begun operating.

This comment does not address the revisions described above and, instead, is based entirely on the part of the definition of “Commencement of Operation” that was not revised or addressed in the proposal. As described above, the State has retained its original, already approved definition and added language to clarify how that definition applies to oil and gas well production facilities. The limited revisions submitted for EPA’s review in this instance do not create a need for EPA to review the original definition language that has not been amended.

Commenter contends that EPA must use modeling data to support its conclusion that the revised definition does not cause or contribute to a violation of the NAAQS. However, Commenter bases this argument on an assertion that the revised definition “excludes oil and gas pollution emitting activities such as drilling wells, ‘fracking’ wells, and completing wells.” This comment conflates the revisions being approved today with the original definition that is not being revised. This comment seeks to have EPA and the State conduct air quality modeling for already approved SIP elements.

Because the two revisions being approved today serve only to clarify timelines for making assessments and deadlines for making submissions during the permit application process, the changes will have no impact on emissions from facilities and no impact on the NAAQS. The State has not revised the nature of the discussion of air quality data under its regulations in a way that requires EPA to reevaluate compliance with 40 CFR 51.160(f). Given the limited effect of the revision here, there was no need for Colorado to submit air quality modeling to support approval of these revisions.

Commenter also argues that EPA must disapprove the revisions being approved today because “pre-production” emissions from oil and gas facilities endanger the NAAQS. Again, this is outside the scope of the rulemaking because the Commenter does not tie this assertion to the actual revisions to Part A, Section I.B, but instead points to the existing part of the definition of

“Commencement of Operation” that is not being revised. Commenter provides links to the CAMML dataset, but does not explain how this data relates to EPA’s approval of the revisions being approved today. Contrary to the Commenter’s assertion, the State is not required to consider air quality data concerning already approved SIP elements when it revises other elements in a SIP and did not do so here. And, because the revisions being approved today are essentially procedural and only serve to establish timelines for conducting assessments or deadlines for making submissions during the permit application process, there is no air quality data available or that can be generated to assess the effect of the State’s revisions on the NAAQS for this action. Moreover, the provisions of Regulation 3 contain requirements for Stationary Source Permitting and Air Pollution Emission Notice Requirements. Drilling and fracking are not subject to regulation under Regulation 3. Instead, completion (pre-production flowback requirements) and production are regulated by Colorado’s Regulation 7, part D, which sources must be in compliance with immediately, upon commencement of operation.

Commenter also argues that the definition of “Commencement of Operation” excludes certain types of oil and gas well development activities and that the State must justify this exclusion. Commenter again relies on the existing part of the definition of “Commencement of Operation” that is not being modified or revised, rather than the revisions to Part A, Section I.B that EPA is approving today. As explained above, those additions serve to clarify certain timelines for the minor NSR permit application process for oil and gas well production facilities and have no impact on the State’s determination as to what facilities will be subject to review under the construction permit program. Because these revisions provide clarity on procedures, and do not by themselves exclude any types of sources from review, they do not create a need in this rulemaking for EPA to review whether unamended elements of the State’s rule meet the requirements in 40 CFR 51.160(e).

On the basis of the above arguments, Commenter states that EPA must disapprove the entire Colorado minor NSR permitting program. This assertion is incorrect. Under Section 110(l)

of the CAA, “The Administrator shall not approve a revision to a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this chapter.” This is captured in 40 CFR 51.105, which provides, “Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.” Even if the Commenter had identified deficiencies with the actual revisions being approved today, which they did not, the proper action for EPA would be to disapprove the revisions we are acting on in this rulemaking, not the entire Colorado minor NSR program. In this case, because the revisions to Part A, Section I.B of Regulation 3 serve only to clarify the timelines for certain actions required in the minor NSR permit application process in Part B of Regulation 3, there is sufficient basis to conclude that the revisions will not interfere with attainment, reasonable further progress, or any other applicable requirement of the CAA. EPA has made no changes to its proposed action in response to this comment.

Comment: Commenter states, “EPA must disapprove Colorado’s SIP submittal because Colorado cannot prevent the construction of a source authorized to pollute by a general permit even if the source will cause or contribute to a violation of a NAAQS or interfere [sic] with reasonable further progress.” In support of this comment, Commenter states that Part B, Section III.I.2.a authorizes a source to construct and operate once they have obtained a valid general construction permit. Commenter then argues that because Colorado’s GP10 version 10 is considered valid upon receipt of a complete APEN registration for a source, Section III.I.2.a allows a source to begin constructing and operating before the Division takes any action on a general permit for that source. Commenter explains that sources are not required to demonstrate that they will not cause or contribute to a violation of the NAAQS, that the Division does not require modeling for these sources, that there is no public comment period during which the public can submit modeling for these sources, and that when the Division does require modeling

for sources obtaining individual construction permits, the Division uses significant impact levels (SILs) to allow sources to avoid cumulative modeling. Commenter states that because EPA has provided no evidence that allowing sources to construct and operate pursuant to a general construction permit will not cumulatively or individually cause or contribute to a NAAQS violation or interfere with reasonable further progress, EPA cannot approve this SIP submittal.

Commenter notes that Section 110(a)(2)(C) provides that a state minor source program must “include ... regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that [NAAQS] are achieved.” Commenter asserts that “EPA’s minor source permitting regulations require that the state minor source program must enable the permitting agency to reject any permit application if it will interfere with attainment,” citing to 40 CFR 51.160(a)-(b). Commenter further asserts that “this requires the prevention of construction” and that because Colorado allows a source to construct and operate under a general permit prior to Division review of the registration, EPA must disapprove the SIP submittal.

Finally, commenter asserts that Section III.I.2.a authorizes sources to commence construction and operations by obtaining a valid general construction permit without any opportunity for public notice and comment with regard to that source. Commenter asserts that the single public notice and comment period the State offers on a general permit is insufficient, and that EPA and the Division must ensure that all sources which obtain coverage under a general permit are subjected to public notice and a public comment period.

Response: Part B, Section III.I.2 of Regulation 3 provides that “[a] source shall not perform” the activities listed in Sections III.I.2.a through III.I.2.e without first obtaining a valid construction general permit. The State is revising Part B, Section III.I.2.a by removing the words “Commence construction” and replacing them with “Construct, operate.” Before the change, sources could not commence construction or modify any facility without a valid permit. After the change, sources cannot construct, operate or modify any facility without a valid permit. The

effect of the change is to make the regulation textually consistent with Section 25-7-114.2 C.R.S., which provides that “No person shall construct or substantially alter any building, facility, structure, or installation . . . or commence operations of any of the same . . . without first obtaining or having a valid construction permit.”

Because the Division implemented its construction permit program to include operation with construction or modification, the change to the wording within this provision has no effect on the scope or NAAQS protection of the existing general permits program, or timing of when permit coverage under the program is required. As such, the comment is unrelated to the revised language that EPA is approving today and does not demonstrate that EPA should not approve the submission addressed by EPA in this rulemaking.

In addition, EPA notes that the State’s general permit regulation includes provisions by which the State can prevent “construction or modification” of a source under a permit, as required by 40 CFR 51.160(b). This includes denying a permit under Section III.I.4, requiring a source to apply for and obtain an individual permit under Section III.I.3.c.(i), or revoking or terminating a permit under Section III.I.3.a.

III. Final Action

The EPA is taking final action to approve the repealing and addition of new and revised rules to Regulation 3 that were submitted by the State of Colorado on May 13, 2020.

Specifically, the EPA is approving the following revisions: **Regulation Number 3, Part A: I.**

(Applicability) - I.B.12; I.B.47; **Regulation Number 3, Part A: II** (Air Pollution Emission Notice (APEN) Requirements - II.A.1; II.A.2; II.A.2(a); II.D.1.III; II.D.1.uuu; II.D.1.zzz;

Regulation Number 3, Part B: II. (General Requirements for Construction Permits) - II.A.1; II.B; II.D.7;; **Regulation Number 3, Part B: III.** (Construction Permit Review Procedures) - III.B.1; III.B.2; and III.G.1.a., III.I.2(a).

IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the State of Colorado's revisions to regulations for its minor source NSR permitting program into the SIP as described in section III of this preamble. The EPA will continue to make these materials generally available through www.regulations.gov and at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the State implementation plan, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.¹

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

¹ 62 FR 27968 (May 22, 1997).

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after

it is published in the *Federal Register*. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 8, 2022.

KC Becker
Regional Administrator,
Region 8.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority for citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart G—Colorado

2. In § 52.320, in the table in paragraph (c):
 - a. Revise, under the center heading “**5 CCR 1001-05, Regulation Number 3, Part A, Concerning General Provisions Applicable to Reporting and Permitting**” the entries:
“I. Applicability” and “II. Air Pollution Emission Notice (APEN) Requirements”.
 - b. Revise, under the center heading “**5 CCR 1001-05, Regulation Number 3, Part B, Concerning Construction Permits**” the entries: “II. General Requirements for Construction Permits” and “III. Construction Permit Review Procedures”.

The revisions read as follows:

§ 52.320 Identification of plan.

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(c) * * *

Title	State effective date	EPA Effective date	Final rule citation/date	Comments
*	*	*	*	*
5 CCR 1001-05, Regulation Number 3, Part A, Concerning General Provisions Applicable to Reporting and Permitting				
I. Applicability	2/14/2020	[insert date 30 days after date of publication in the Federal Register].	[insert Federal Register citation], [insert date of publication in the Federal Register].	
II. Air Pollution Emission Notice (APEN) Requirements	2/14/2020	[insert date 30 days after date of publication	[insert Federal Register citation], [insert date of	

		in the Federal Register].	publication in the Federal Register].	
*	*	*	*	*
5 CCR 1001-05, Regulation Number 3, Part B, Concerning Construction Permits				
*	*	*	*	*
II. General Requirements for Construction Permits	2/14/2020	[insert date 30 days after date of publication in the Federal Register].	[insert Federal Register citation], [insert date of publication in the Federal Register].	
III. Construction Permit Review Procedures	2/14/2020	[insert date 30 days after date of publication in the Federal Register].	[insert Federal Register citation], [insert date of publication in the Federal Register].	
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[FR Doc. 2022-24858 Filed: 11/21/2022 8:45 am; Publication Date: 11/22/2022]